

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

JIMMY S. MALO,

Defendant and Appellant.

D051302

(Super. Ct. No. SCN201740)

APPEAL from a judgment of the Superior Court of San Diego County, Marguerite L. Wagner, Judge. Affirmed.

Jimmy Malo appeals from a judgment convicting him of attempted voluntary manslaughter and two counts of assault with a firearm. He contends the trial court erred by (1) admitting evidence about his gang membership, (2) limiting the manner in which he presented evidence of his gunshot wounds to the jury, and (3) imposing consecutive rather than concurrent sentences. We reject his arguments and affirm.

## FACTUAL AND PROCEDURAL BACKGROUND

On October 15, 2005, plain-clothed gang unit officers John Anderson, Sean Marchand and Dwight Ayers were patrolling in the city of Oceanside in an unmarked sports utility vehicle (SUV). At about 9:15 p.m. they drove to the residence of Masi Tolua, a member of the Deep Valley Bloods gang in Oceanside. Officer Ayers was driving and Officer Anderson was sitting in the front passenger seat; both had their windows rolled down. Officer Marchand was sitting in the back seat on the passenger side with his window rolled up.

As the officers drove in front of Tolua's residence, they momentarily stopped to allow a pedestrian to cross in front of the SUV and go to Tolua's residence. There were about 30 to 50 people in the front yard of Tolua's residence. Some men in the crowd were dressed in the red color associated with the Deep Valley Bloods. As the officers drove by, Officer Anderson made eye contact with a man in the crowd and several other people also glanced at him.

After the pedestrian crossed by the SUV, Officer Ayers continued driving slowly down the street. When he reached the end of the dead-end street, he turned the SUV around and slowly drove back up the street. Concerned that there might be trouble at the Tolua residence because of its reputation for gang activity and the presence of the large crowd, Officer Ayers un-holstered his gun and placed it on his lap.

When the officers were about four houses before the Tolua residence, they heard a gunshot. Officer Anderson yelled loudly, "No," "We're the police." The officers saw a man (later identified as Malo) with a gun in his hand walking towards the driver's side of

the SUV. Malo's arm was raised and he was pointing the gun in the officers' direction. Officer Marchand heard Malo say, "What's up, Niggas?" When Officer Ayers saw Malo's gun pointed at him, he brought his gun up to shoot and "almost simultaneously" saw the muzzle flash from Malo's gun. At a distance of about 10 feet, Malo fired at the officers.<sup>1</sup> Officer Ayers fired four shots at Malo through the open, driver's-side window of the SUV.

As Officer Ayers was firing, he saw Malo's body start to move and then fall to the ground. Meanwhile, Officers Anderson and Marchand exited the SUV. Malo, who had been shot, was laying in the road, with a gun underneath his body. The police arrested him, and he was transported to the hospital by ambulance.

An examination of the revolver used by Malo revealed that three bullets had been fired. Two bullet holes were found in the SUV, one in the rear passenger-side window, and the other in the rear driver's-side door. Two bullets were found which appeared to correspond to these two bullet holes. The bullet which was believed to have gone through the closed, rear passenger-side window was found outside the SUV on the passenger side. This bullet matched Malo's revolver, and had a white crystalline material imbedded into its tip which could have been glass from the SUV window. A crime laboratory criminalist opined that the bullet entered the vehicle through the open driver's

---

<sup>1</sup> The officers did not observe who fired the first gunshot, although they surmised it came from Malo. The officers did observe that the second gunshot came from Malo. Officers Ayers and Marchand thought it was possible that Malo also fired a third shot. The officers did not see any person shooting other than Malo.

window and then struck the rear closed window from the inside before exiting the vehicle.

The bullet believed to have caused the hole in the rear, driver's-side door was found behind the panel of that door. The bullet was too damaged to permit matching with a firearm. However, the bullet appeared similar to the bullet that matched Malo's revolver, and the extent of damage to the bullet was consistent with it striking a hard object like metal.

The authorities performed a laser trajectory reenactment to estimate the path of the bullet believed to have gone through the open driver's window in relation to where the officers had been seated in the SUV. In this reenactment, the bullet was shown to have come within four to six inches of Officer Ayers's head, within three inches of Officer Marchand's chest, and within two feet of Officer Anderson's head.

### *Defense*

Testifying on his own behalf, Malo stated that he was invited to Toluao's home after attending a memorial ceremony. Malo noticed the SUV idling in the middle of the road, and it appeared that the person in the front passenger seat was "mad-dogging" (i.e., glaring) at people in the crowd. Malo, who had grown up in the neighborhood, thought there might be gang members in the vehicle preparing to do a drive-by shooting. He was afraid the people at the gathering, including women and children, were in danger. When he saw the SUV move in a "creeping fashion" down the street and then back towards the residence, his concerns that a drive-by shooting was about to take place were heightened.

Malo told some people at the gathering that he was going to investigate the vehicle to determine who it was. Someone handed him a gun and said, "'You should take this.'" As he was walking toward the SUV, he pointed the gun in the air, fired it once as a warning shot, and said, "'What's happening?'" Malo testified that he was hoping to get the driver's attention, thinking that if the vehicle's occupants were gang members they would challenge him or fire back, and if they were innocent people they would speed away after hearing the gunshot.

Malo testified that he saw the driver of the SUV exit the vehicle, and he was then repeatedly shot. He stumbled off the curb where he was standing and fell to the street. He stated that he "blanked out" and had no memory of anything further. He claimed he had no recollection of ever voluntarily or intentionally firing a second or third shot with the revolver; he did not know the SUV occupants were police officers; and he had no intent to kill anyone.

### *Verdict and Sentence*

Malo was charged with three counts of attempted premeditated murder and three counts of assault with a firearm on a peace officer. The jury acquitted him of these charges. The jury found him guilty of one count of the lesser included offense of attempted voluntary manslaughter (victim Officer Ayers), and three counts of the lesser included offense of assault with a firearm (victims Officers Ayers, Marchand, and

Anderson), with true findings that he personally used a firearm.<sup>2</sup> He received an 11-year, eight-month sentence.

## DISCUSSION

### *I. Admission of Gang Membership Evidence*

Malo argues the trial court abused its discretion by permitting the prosecutor to cross-examine him about his gang affiliation, and by permitting a gang expert to testify about his past gang affiliation and to opine that he was currently a gang member.

#### *A. Background*

##### *Pretrial Ruling Excluding Gang Membership Evidence*

Prior to trial, the prosecution moved to admit evidence of Malo's gang affiliation. The prosecutor proffered the testimony of Oceanside police officer Gordon Govier who had concluded from his investigation that Malo met the criteria to be classified as a gang member. According to the prosecutor's offer of proof, on one occasion in 1995 and on numerous occasions in 1996 Malo had been contacted by the police regarding criminal or gang activity. During these contacts he variously was in the company of other Deep Valley Bloods members, claimed membership in Deep Valley Bloods, had the letters DVB tattooed on his middle finger, identified himself by gang monikers, and was wearing the red gang color. Further, at the time of the October 2005 shooting, he still had the DVB tattoo on his finger. The prosecutor stated that Officer Govier would testify that

---

<sup>2</sup> The jury deadlocked on the two lesser included offenses of attempted voluntary manslaughter against Officers Marchand and Anderson.

it was important for gangs to protect their territory, and that Malo's shooting at the persons whom he believed were rival gang members would have improved his status within the Deep Valley Bloods.

The prosecutor argued the gang evidence was highly probative to show that Malo premeditated and had a motive to shoot at the SUV because he thought the vehicle's occupants were members of a rival gang and he wanted to protect the Deep Valley Bloods territory and make a preemptive strike by shooting at them.

Objecting to admission of the gang evidence, defense counsel conceded that Malo had been a Deep Valley Bloods member in 1996 when he was in high school, but stated he had stopped this affiliation when he graduated from high school, went to college, and moved out of the neighborhood. Defense counsel argued the evidence was remote and of no probative value, noting that Malo had no contacts with the police for the past 10 years and he was not wearing red when he attended the gathering after the memorial ceremony.

The trial court denied the prosecution's request to present the evidence, noting that a gang enhancement had not been charged, and finding the evidence of Malo's gang affiliation was remote and more prejudicial than probative. However, the court stated it might reconsider its ruling based on the evidence presented at trial, including character evidence from the defense.

#### *Malo's Trial Testimony*

When he testified at trial, Malo described his status as an educated, gainfully-employed, married man with children. He stated that after graduating from high school in 1997, he attended Palomar Community College for two years, and then attended the

University of Minnesota for three years, studying criminology. After college, he returned to live in his childhood neighborhood, and had been working as a meter reader for San Diego Gas & Electric. He stated he aspired to be a probation officer to assist young people growing up in his neighborhood. As noted, he claimed that he confronted the SUV because he was concerned that its occupants might be gang members who intended to engage in a drive-by shooting and harm the people at the gathering; he only fired a warning shot into the air; and he did not intentionally shoot at the SUV.

*Ruling Permitting Cross-Examination of Malo on Gang Membership*

After Malo's testimony, the prosecutor renewed his motion to present evidence about Malo's gang affiliation. The prosecutor argued he should be permitted to cross-examine Malo on this issue given Malo's testimony addressing his good character, his knowledge of how gangs operate during drive-by shootings, and his claim that he had no intent to kill anyone. Over defense objection, the trial court granted the prosecutor's request, finding the prosecutor was entitled to rebut the suggestion in Malo's testimony that he had stayed free of gang activity.

On cross- and redirect examination, Malo acknowledged that the letters DVB were tattooed on his finger; that he had been affiliated with and documented as a Deep Valley Bloods gang member when he was in high school; and that there were at least two other Deep Valley Bloods members at the gathering at the Toluao residence. He testified he abandoned his membership in the gang after graduating from high school and denied that he was acting to protect Deep Valley Bloods gang territory.



### *Ruling Permitting Gang Expert Testimony*

After cross-examining Malo, the prosecutor also moved to admit the testimony of gang expert Officer Govier as rebuttal evidence. The prosecutor argued this testimony was relevant to impeach Malo's testimony that he was not a gang member protecting the gang's territory. Over defense objection, the trial court ruled the evidence was admissible, reasoning that the expert's testimony was relevant because Malo was denying present gang affiliation whereas his actions could suggest otherwise.

Officer Govier presented general testimony about gangs, including that gang members assist their gang by "hanging out" in the gang area to protect other gang members, wearing the gang's colors, and getting tattooed with the gang's symbols. He stated gang members use tattoos to identify themselves to other gang members and the community and to show their willingness to participate in the gang. Gang members are expected to protect their turf, which would include committing assaults on rival gang members who enter the gang's territory. Further, commission of crimes against law enforcement officers improves a gang member's standing in the gang.

Officer Govier described the graffiti, color red, and territory associated with the Deep Valley Bloods gang, and identified the Deep Valley Crips as a rival gang of the Deep Valley Bloods. Officer Govier explained that to be documented as a gang member, a person must generally meet two of the 10 criteria specified by the California Department of Justice. In Officer Govier's opinion, Malo satisfied four of the criteria based on the current offense: i.e., he was arrested for a crime that is associated with typical gang activity; he was contacted by law enforcement while in a gang area; he was

contacted by law enforcement while associating with other documented gang members; and he had a DVB tattoo on his finger.<sup>3</sup> Further, he satisfied two additional criteria based on his prior contacts with law enforcement in the late 1990's; i.e., during these previous contacts he was wearing the gang color red and he told law enforcement that he was a Deep Valley Bloods gang member.

Officer Govier opined that the 10-year gap between the prior and current incidents did not mean that Malo was no longer a Deep Valley Bloods gang member, because gaps in documented activity can be created by such factors as moving out of state or incarceration. Finally, Officer Govier opined that based on his training and experience and his review of the reports and documentation, he believed Malo was currently a Deep Valley Bloods member.

### B. Analysis

Gang evidence, including evidence about a defendant's gang membership and expert testimony about gangs, is generally admissible if it is relevant to a material issue in the case other than criminal disposition, is not more prejudicial than probative, and is not cumulative. (*People v. Albarran* (2007) 149 Cal.App.4th 214, 223; *People v. Avitia* (2005) 127 Cal.App.4th 185, 192.) As explained in *People v. Hernandez* (2004) 33 Cal.4th 1040, 1049, "Evidence of the defendant's gang affiliation—including evidence of the gang's territory, membership, signs, symbols, beliefs and practices, criminal

---

<sup>3</sup> Detective Govier testified that five of the persons present at the October 2005 gathering were identified as documented gang members.

enterprises, rivalries, and the like—can help prove identity, motive, modus operandi, specific intent, means of applying force or fear, or other issues pertinent to guilt of the charged crime." (*Ibid.*)

However, trial courts are required to carefully scrutinize evidence of a defendant's gang membership because it creates a risk the jury will improperly infer the defendant has a criminal disposition and is therefore guilty of the charged crime. (*People v. Carter* (2003) 30 Cal.4th 1166, 1194.) Thus, even relevant gang evidence may have a highly inflammatory effect on the jury. (*People v. Avitia, supra*, 127 Cal.App.4th at p. 192.) Given this high potential for prejudice, gang evidence should not be admitted if it is only tangentially relevant to the charged offenses. (*People v. Albarran, supra*, 149 Cal.App.4th at p. 223.) Further, the California Supreme Court has cautioned that in cases not involving a gang enhancement, gang evidence should not be admitted if its probative value is minimal. (*People v. Hernandez, supra*, 33 Cal.4th at p. 1049.)

We apply the abuse of discretion standard to evaluate a trial court's ruling that gang evidence was relevant and that its probative value outweighed prejudicial effect. (*People v. Avitia, supra*, 127 Cal.App.4th at p. 193.) The trial court's ruling will not be disturbed on appeal absent a showing that it exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a miscarriage of justice. (*Ibid.*)

Here, based on Malo's testimony, the trial court could reasonably conclude the gang evidence was relevant on the issue of motive to shoot directly at the SUV, and that its probative value was sufficiently high so that it outweighed the potential for prejudice. Malo testified that one of the SUV occupants was "mad-dogging" the crowd; he was

concerned that the SUV occupants were gang members who intended to engage in a drive by shooting; he fired a warning shot into the air because he wanted to protect the people at the gathering; he was then shot and fell to the ground; and he never intentionally shot at the SUV. Malo's testimony imbued the incident with potential gang characteristics, based on his perception that the SUV occupants might be gang members. Further, his testimony contradicted the officers' claims that after hearing the first gunshot, they saw Malo walk towards the SUV, point his gun directly at them, and shoot. Malo's testimony presented the jury with evidence that could support a finding that he had a motive only to shoot in the air—that is, that he had no motive to shoot directly into the SUV because he was acting solely to protect the people at the gathering. Evidence that Malo was a gang member, as well as expert evidence about gang territory-protection activities, was highly relevant to rebut the innocent motive proffered by Malo—that is, to show that he did have a motive to shoot directly at the SUV because he was acting to protect gang territory from possible rival gang members.

Malo argues the trial court abused its discretion given the remoteness of the evidence of his gang membership. The trial court was initially persuaded by this argument, but then altered its ruling after Malo testified. This was not unreasonable. As stated, the trial court could reasonably find that Malo's testimony significantly elevated the probative value of the evidence of his gang involvement. Although there was no evidence of gang-related contacts with Malo in the 10 years prior to the current offense, the trial court could reasonably conclude that evidence of his past gang involvement was

highly relevant to rebut his claim that he responded to a perceived gang threat solely by shooting in the air and with the sole motive of protecting the people at the gathering.

Malo also asserts the gang evidence was particularly prejudicial because the gang expert was permitted to give an opinion that he was currently a gang member. Although arguably the expert's final opinion that Malo was currently a gang member was excludable because the jury could have made this ultimate determination for itself (*People v. Olguin* (1994) 31 Cal.App.4th 1355, 1371; *People v. McAlpin* (1991) 53 Cal.3d 1289, 1299-1300), this single item of evidence does not show the expert's testimony was more prejudicial than probative or that there was a miscarriage of justice requiring reversal.<sup>4</sup> The trial court could reasonably find that the expert's opinion that Malo met the criteria for gang member documentation was admissible, based on findings that this evidence was relevant to the issues, was more probative than prejudicial, and was not a matter within the common knowledge of the jury. From this permissible testimony, it was clear the expert believed Malo was a current gang member. The expert's final single statement to this effect, even if excludable, was not in the nature of evidence that rendered his entire testimony more prejudicial than probative or that affected the fairness or outcome of the trial.

---

<sup>4</sup> Although defense counsel generally objected to admission of the expert's testimony, he did not object when the expert was asked to give his final opinion as to whether Malo was currently a gang member. Given our resolution above, we need not discuss whether Malo waived his right to complain about this aspect of the expert's testimony.

The trial court did not abuse its discretion or violate Malo's constitutional rights by permitting the prosecutor to cross-examine him about his gang membership and permitting the gang expert to testify on this issue.

## *II. Trial Court's Rulings Regarding Malo's Display of Wounds*

Malo argues the trial court abused its discretion by (1) precluding him from getting closer to the jury to display his various gunshot wounds, and (2) precluding him from lowering his pants and underwear to display to the jury gunshot wounds on his thighs and buttocks.

Both the prosecution and the defense presented evidence regarding the location and number of Malo's gunshot wounds. Officer Ayers testified that at the scene he observed Malo bleeding from his ankle, buttocks, thighs, and lower groin area. Prosecution witness Officer Yanci Blackwell testified that when Malo was at the hospital, he observed a wound on Malo's left arm, a wound on each of his upper thighs near his groin area, and a wound above his right ankle. Malo testified that he suffered a wound on his left arm, two wounds on his thighs (one wound on each thigh), two wounds on his buttocks (one on each side of his anus), and two wounds near his right ankle (one on the interior side of his foot and the other on the rear of his foot).

In closing arguments to the jury, the prosecutor argued that the prosecution and defense evidence describing the wounds was consistent with Officer Ayers's testimony that he shot Malo four times (even though Officer Ayers's gun was missing five bullets

and there were more than four wounds on Malo's body).<sup>5</sup> The prosecutor contended that the location of Malo's wounds showed that one bullet hit his arm and three bullets went all the way through his body—that is, the second and third bullets went all the way through his groin area, and the fourth bullet went all the way through his right ankle. In contrast, defense counsel argued the wound evidence impeached the officers' testimony. Defense counsel asserted that Officer Ayers's description of the shooting was not plausible because he claimed he aimed at Malo's upper torso, and yet none of the bullets hit this area. Further, defense counsel contended there was no evidence any of the bullets went all the way through Malo's body, and the buttock and ankle wounds showed that he was not shot while walking towards the officers, but rather was shot from behind and while lying on the ground.

Defense counsel requested that Malo be permitted to display his wounds to the jury during his testimony. The trial court ruled that given the charges against Malo, he would not be permitted to approach "within inches" of the jury, and further he would not be permitted to lower his pants or underwear to display his thigh and buttock wounds. However, he would be permitted to display his arm and ankle wounds from the witness stand or from "the middle of the well," and he could point to the location of his thigh and buttock wounds.

---

<sup>5</sup> Officer Ayers testified that the magazine of his semi-automatic weapon holds five bullets, but one bullet is removed from the magazine to the chamber when the pistol is "rack[ed]." Typically, officers "top off the gun" by loading an extra round into the magazine, but Officer Ayers did not do so that evening when preparing his weapon, thus there were only four bullets in the magazine.

When Malo was on the witness stand, he rolled up his sleeve to display his arm wound and he removed his shoe and sock to display his ankle wounds. He also pointed to his thigh and buttock wounds. Defense counsel was also permitted to elicit testimony from Malo that if he had been permitted to show his thigh and buttock wounds, the jury would see scars at these locations.<sup>6</sup>

We review the trial court's evidentiary rulings for abuse of discretion. (*People v. Vieira* (2005) 35 Cal.4th 264, 292.)

On appeal, Malo argues that "the location and number of [his] gunshot wounds were relevant to support [his] testimony and his defense and to impeach the credibility of the officers' version of what happened during the shooting." To support his argument, he posits that if the jury had been able to obtain a closer view of his wounds and to actually see his thigh and buttock wounds, it would have been better able to assess the falsity of the prosecution's theory that the thigh and ankle bullets went all the way through his body, which was relevant to impeach Officer Ayers's testimony that he shot at Malo only four times. He further asserts that a closer and actual view of his wounds would show that he was shot from behind in the buttocks, and was shot numerous times. He contends that this evidence (particularly the buttock wounds) would impeach the officers' testimony that he was shot while facing the SUV and firing a gun at them; would support the defense theory that he fired the shots at the SUV accidentally or in reasonable self-

---

<sup>6</sup> Although a police field technician took pictures of Malo's wounds, neither party presented these photographs at trial for the jury to view.



defense as he was falling to the ground; and would support an alternative defense theory that there might have been a second shooter who shot at the SUV and, perhaps, even shot Malo.

Malo does not point to anything in the record showing that the trial court was apprised of any information indicating that a closer view of his wounds, or an actual view of his thigh and buttock wounds, would provide the jury with meaningful information beyond what the jury was actually provided. Defense counsel was permitted to present evidence apprising the jury of the exact number and location of all the wounds, and the dispute was whether any of the bullets went all the way through Malo's body. However, neither party presented medical evidence on this issue, and defense counsel did not assert to the trial court that a closer or actual view of the wounds would assist the jury in resolving this dispute. In his briefing on appeal, Malo has likewise failed to specify how a closer or actual inspection by the jury would meaningfully augment the evidence provided to the jury.

Malo also contends that because he was only permitted to point to his thigh and buttock wounds, the jury was free to question whether these wounds were actually there. The record shows that the location of the wounds was essentially undisputed. The upper thigh wounds were acknowledged by Officer Blackwell who observed Malo at the hospital. Although Officer Blackwell did not mention seeing the buttock wounds, Officer Ayers testified that he saw Malo bleeding from the buttocks at the scene. In closing arguments to the jury, the prosecutor referred to the demonstrative evidence provided by Malo's testimony, and characterized it as showing that the bullets went through the groin

area and out his "rear." Given that there was no serious dispute as to the location and number of wounds, the trial court was not required to permit the jury to actually see the thigh and buttock wounds.

The trial court reasonably concluded that for safety reasons Malo should not be permitted to approach close to the jury, and that to preserve courtroom decorum it was not appropriate to permit Malo to lower his pants or underwear absent some strong reason warranting this display. Because there is no showing the trial court's rulings interfered with Malo's opportunity to challenge the prosecution's case or to present his defense, there was no abuse of discretion.

Given our holding, we need not address the Attorney General's arguments that these issues were forfeited on appeal.

### III. *Consecutive Sentences*

The trial court sentenced Malo to 11 years, eight months in prison. The court imposed a three-year middle term for attempted voluntary manslaughter against Officer Ayers, and a four-year middle term for the personal gun use enhancement. The court selected two consecutive sentences of two years, four months for the offenses of assault with a firearm with a personal gun use enhancement against Officers Anderson and Marchand—i.e., one third the three-year middle term for the assault offenses (one year), and one-third the four-year middle term for the gun enhancements (16 months).

The trial court stated that it was selecting consecutive sentences for the assault offenses because the victims were particularly vulnerable and the crimes involved separate acts of violence. Malo asserts the trial court abused its discretion in selecting

consecutive, rather than concurrent, sentences. He argues that the crimes did not involve separate acts of violence but rather arose from a single act of shooting, and that the officers were not particularly vulnerable victims because they were armed and able to call for backup assistance. Further, he contends mitigating circumstances outweighed aggravating circumstances because he has no criminal history; his conduct was aberrant behavior that was not likely to recur; and the jury's attempted voluntary manslaughter verdict reflects that he acted in unreasonable self-defense.

A trial court has broad discretion when deciding whether to impose consecutive or concurrent sentences for two or more crimes. (*People v. Shaw* (2004) 122 Cal.App.4th 453, 458.) In making its decision, the court may consider the relationship between the crimes, including whether they involved separate acts of violence or threats of violence. (Cal. Rules of Court, rule 4.425(a)(2).)<sup>7</sup> Further, the court may consider circumstances in aggravation or mitigation. (Rule 4.425(b).) Aggravating circumstances include a victim who was particularly vulnerable. (Rule 4.421(a)(3).) A trial court's discretionary sentencing choice will not be disturbed unless there is a clear showing it was arbitrary or irrational. (*People v. Oberreuter* (1988) 204 Cal.App.3d 884, 887, disapproved on other grounds in *People v. Walker* (1991) 54 Cal.3d 1013, 1022.)

Violent conduct that threatens or harms more than one victim may be punished with a consecutive sentence even if the offenses occurred during a single course of conduct. (See *People v. Calhoun* (2007) 40 Cal.4th 398, 408; *People v. Leung* (1992) 5

---

<sup>7</sup> Subsequent references to court rules are to the California Rules of Court.

Cal.App.4th 482, 502-505; *People v. Gutierrez* (1992) 10 Cal.App.4th 1729, 1739; *People v. Shaw, supra*, 122 Cal.App.4th at p. 459.) The trial court was entitled to select consecutive sentences based on the fact that Malo's conduct created three separate threats of violence to three different victims.

The record also supports the trial court's finding that the victims were particularly vulnerable. An evaluation of victim vulnerability includes consideration of "the total milieu in which the commission of the crime occurred." (*People v. Ramos* (1980) 106 Cal.App.3d 591, 607, disapproved on other grounds in *People v. Scott* (1994) 9 Cal.4th 331, 353, fn. 16.) Although the officers were armed and had access to a police radio, they were confined in their vehicle when Malo opened fire. A summons on the police radio did not ensure a response in time to stop injury or death from the shooting. The court could consider that it would have been difficult for Officer Ayers, who was closest to Malo and whose window was open, to simultaneously speed away from the scene and defend himself from shots fired by Malo. Officer Ayers described the awkward shooting stance he adopted to defend himself; i.e., reaching over his body with his right hand to shoot out the window, while holding the steering wheel with his left hand.

Further, Officers Marchand and Anderson testified that they did not have a good vantage point to permit accurate shooting at Malo. Officer Marchand, who was sitting on the passenger side of the back seat, testified that he tried to aim at Malo through the closed, driver's side back window, but the tint on the back window was too dark for him to see and he would have been shooting blindly. Officer Anderson, who was sitting in the front passenger seat, testified that he could not shoot at Malo because Officer Ayers

was in the way and if he had shot he would have endangered Officer Ayers. Officer Marchand, who stated that he felt like a "sitting duck," was initially unable to open the back door of the vehicle to allow him to exit, and he had to struggle with the locking mechanism. The trial court could reasonably find that the three officers were more vulnerable than other firearm assault victims because they were in a confined space making them easy targets and with no assurances that they could effectively disable the shooter.

The record supports the two factors cited by the trial court for consecutive sentences. Although, as argued by Malo, mitigating factors were also present, they were not so dominant as to compel concurrent sentences. (See *People v. Oberreuter*, *supra*, 204 Cal.App.3d at p. 887 [trial court may weigh aggravating and mitigating factors in qualitative as well as quantitative terms].) Further, the trial court did take mitigating factors into consideration when making its sentencing choices. The trial court stated that because of Malo's background, it was rejecting the suggestions made by the probation officer and the district attorney to select upper terms and impose a 21-year, eight-month or 24-year, two-month sentence. The trial court reasonably selected consecutive sentences for the two assault offenses given that Malo's conduct of opening fire endangered the lives of all three individuals confined within the motor vehicle.

DISPOSITION

The judgment is affirmed.

---

HALLER, J.

WE CONCUR:

---

HUFFMAN, Acting P. J.

---

NARES, J.